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No. 482.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, Deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the District Court (R. 112, 129) is reported in 19 Fed. Supp. 56. The opinion of the Circuit Court of Appeals (R. 154-163) is reported in 99 F. 2d 799.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The petition for *certiorari* was filed on November 22, 1938, and *certiorari*

was granted on January 3, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by this writ arise under Section 302 of the Federal Estate Tax Act of 1926 (44 Stat. 70), the essential provisions of which are as follows:

> "Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *."

The questions presented are:

1. Whether the Federal Estate Tax Act of 1926 (Revenue Act of 1926, 44 Stat. 71) is not unconstitutional in purporting to include in the gross estate the survivor's half interest in jointly held property (in addition to including the decedent's half interest) where the joint tenancy was created prior to any federal estate tax act.

2. Whether the Act mentioned does not in terms exempt from inclusion in the gross estate property contributed by the survivor to a joint tenancy, even though such property was first given by the decedent to the survivor, where the gift by the decedent and the contribution by the survivor took place prior to any federal estate tax act.

Statutes and Regulations Involved.

The statutes and regulations involved are set out in the Appendix A, *infra,* pp. 35-38.

Statement.

The facts were stipulated (R. 43-50, inc.) except that brief testimony was introduced by petitioner (R. 38-41, inc.). The findings adopt the stipulation and testimony. They may be summarized as follows:

On June 11, 1930, Henry C. Folger died a resident of New York leaving him surviving his wife, Emily C. J. Folger (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, together with Mrs. Folger, owned, as joint tenants, shares of the stocks of fifteen Standard Oil companies (R. 86, 87). The joint accounts in all of these stocks were created prior to September 9, 1916, the effective date of the first federal estate tax act (R. 87, 88).

Back in 1912, Mr. Folger had begun making to Mrs. Folger absolute gifts of varying amounts of stock in the Standard Oil Companies. Prior to May 29, 1912, he gave her 251 shares of the capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave her 656½ shares of the capital stock of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the corporate books (R. 90).

In 1914, Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil Companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger, too, transferred into these accounts in their joint names some of the shares which Mr. Folger had

given her outright one or more years before. She transferred 250 of the 251 shares of stock of the Standard Oil Company of New York into their joint names on February 9, 1916, about four years after the gift to her (R. 90). On February 9, 1915, about a year after the gift of the shares of the Standard Oil Company (California), she transferred into a joint account ½ share of the 656½ shares of the stock of that company, and on February 24, 1916, about two years after the gift, she transferred into the joint names the remaining 656 shares (R. 91).

As of the date of the death of Mr. Folger, the shares so transferred by Mrs. Folger to the joint names had a value of $846,772.15 (R. 90, 91), and those transferred by Mr. Folger, $2,760,247.04, making the total death value of the shares transferred by both, $3,607,019.19 (R. 89). All of these transfers to joint accounts were made prior to September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756) (R. 90, 91).

The estate returned only one-half of the value of these jointly held stocks for taxation on the theory that Congress could not constitutionally levy an estate tax upon the survivor's half interest. The Commissioner of Internal Revenue assessed the entire joint estate without even deducting the value of the shares contributed by Mrs. Folger (R. 92, 93).

The Collector of Internal Revenue demanded an additional tax based in part upon the inclusion of the full value of the joint property in the gross estate. The estate paid the tax, applied for the refund thereof, and, upon its denial, brought this suit for its recovery (R. 94).

The District Court found as conclusions of law that the Commissioner (a) properly determined that the full value of the stocks held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint accounts representing property transferred thereto by Mrs. Folger should be excluded from the gross and net estates (R. 98, 99). The taxpayer excepted

R. 104) and assigned error on appeal to the United States ircuit Court of Appeals for the Second Circuit (R. 136, 37, 140). The latter affirmed the judgment of the District ourt (R. 164).

The taxpayer computes the tax which should be repaid cause assessed upon Mrs. Folger's half of the joint operty at $52,877.33, and the tax which should be repaid cause assessed upon Mrs. Folger's contributions at 6,298.45 (R. 103). Since the first of these sums includes e second, the maximum possible recovery is $52,877.33, d success of the taxpayer upon the first point will elimate the necessity for consideration of the second.

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the Commissioner of Internal Revenue properly cluded in the decedent's gross and net estates for estate x purposes the full value of the stocks held in the joint counts.

2. That the Commissioner of Internal Revenue properly cluded in the decedent's gross and net estates the individl property of Mrs. Folger transferred to the joint acunts by her.

3. That Section 302, subdivisions (e) and (h), of the venue Act of 1926, as applied in the circumstances of this se, are valid under the due process clause of the Fifth nendment of the Constitution of the United States.

4. That the judgment of the District Court should be irmed.

Summary of Argument.

As to Point I—Mrs. Folger's Half Interest.

While this Court has held that Congress can constitutionally tax the decedent's half of a joint tenancy created prior to the incidence of any federal estate tax act (*Gwinn* v. *Commissioner*, 287 U. S. 244 (1932)), it has never passed upon the power of Congress to tax the survivor's half. The Circuit Court of Appeals for the Second Circuit in the case at bar ruled in favor of the power to lay such a tax, and the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Jacobs*, 97 F. 2d 784 (1938), ruled to the contrary.

This Court has, however, said that a statute laying such a tax would be a retroactive act affecting a closed transaction, and that the intention of Congress to avoid doing such a thing would be presumed unless the language used compelled a contrary conclusion. (*Knox* v. *McElligott*, 258 U. S. 546 (1922) followed in *Cahn* v. *United States*, 297 U. S. 691 (1936)). This Court therefore held in *Knox* v. *McElligott* that the first federal estate tax act did not reach the survivor's interest in a preexisting joint tenancy and held in a companion case (*Union Trust Company* v. *Wardell*, 258 U. S. 537 (1922)), that it did not reach a preexisting interest of a trust beneficiary.

Congress has since these companion decisions changed its language so that the retroactive purpose is unmistakable.

The cases now before this Court are the first to test this attempt of Congress at retroactive taxation in so far as it applies to the preexisting interest of a surviving joint tenant, but in so far as it applies to preexisting trust estates it has been tested and has failed. In *Nichols* v. *Coolidge*, 274 U. S. 531 (1927), *Helvering* v. *Helmholz*, 296 U S. 93 (1935) and *White* v. *Poor*, 296 U. S. 98 (1935), this Court held ineffective the attempt of Congress to tax trust estates created prior to the incidence of the federal estate tax act. The argument that a tax is levied on the occasion of the

ripening of further rights therein on the death of the settlor was of no avail.

Mrs. Folger's preexisting property right in this case is much more substantial than the preexisting property rights of the trust beneficiaries in the *Nichols, Helmholz* and *White* cases, in that before the passage of the federal estate tax act she had the power to sell a half interest in the joint property for exactly half the value of the whole. The only particular in which her interest was less substantial than that of the trust beneficiaries was that until the death of her co-tenant she ran the risk that she might lose her property right by being the first to die. The risk that she might lose this half interest by being the first to die did not reduce its value. The value of anything is what it can be sold for and her interest could at all times have been sold for half of the value of the whole. This Court in *Knox* v. *McElligott*, 258 U. S. 546, *supra*, and *Cahn* v. *United States*, 297 U. S. 691, *supra*, when it fixed the value of the surviving joint tenant's share which could not be reached by a non-retroactive act, fixed it at one-half of the value of the whole without any deduction for the risk of loss in the event of failure to survive the co-tenant.

The Court below and the Government seek to sustain this tax upon the whole property, when only half of it was transferred after the incidence of the federal estate tax act, by saying that under the classic definition of a joint tenancy each tenant owns the whole so that when one dies and the survivor receives his interest, the survivor receives the whole. The argument if good would work just as well the other way, i. e., that as the survivor always had the whole, he received nothing on the decedent's death. As a matter of fact, the argument was urged in just that way in favor of the taxpayer in *Tyler* v. *United States*, 281 U. S. 497 (1930) and *Gwinn* v. *Commissioner*, 287 U. S. 224, *supra*, and was rejected by this Court in both of those cases.

The *Tyler* case is of the utmost importance in the present controversy in view of the rule there laid down that these cases involving the constitutionality of taxes are to be deter-

mined on the basis of the practical effect of the taxes rather than upon the metaphysical conception of the common law estates involved.

In view of the nature of the tenancy by the entirety pointed out in the *Tyler* case, where the separate rights of each tenant are substantially zero, this Court in a *per curiam* opinion in *Third National Bank and Trust Co.* v. *White*, 287 U. S. 577 (1932), upheld the subjection to federal estate tax of the full value of property held in a tenancy by the entirety although the estate had been created prior to the incidence of the taxing act.

That decision does not militate against our contention that in the case of a joint tenancy created prior to the passage of the taxing act, Congress is limited to the taxation of the half which the survivor receives upon the death of the decedent. The surviving joint tenant at all times had a property right in one-half as opposed to the position of a tenant by the entirety whose rights are substantially nil until the estate is destroyed by the death of one spouse. Joint tenants hold *per tout et per my* while tenants by the entirety hold *per tout et non per my*.

The theoretical argument is pressed further and it is said that the decedent's interest is really an interest in the whole because it is an undivided interest. That, however, can be said with equal force with respect to the interest of a tenant in common, and the Government takes nothing by the argument for no one would urge that Congress had power to tax by a retroactive statute all the property held in a tenancy in common when one tenant died and bequeathed his share to his co-tenant.

Whatever may be the practical situation, the Government urges that the theoretical view has been adopted by this Court in *Foster* v. *Commissioner*, 303 U. S. 618 (1938), where the entire value of property held in a joint tenancy created after the federal estate tax act was held to be taxable. It required no metaphysics, however, for this Court to reach that result. The federal estate tax act with respect to rights vesting after its passage acts as an excise tax act

laying the tax upon the original vesting but postponing the assessment and payment until death.

The argument that Congress could levy the tax upon the permissible half but measure it upon the exempt half was answered in *Nichols* v. *Coolidge,* 274 U. S. 531, *supra.*

As to Point II—Mrs. Folger's Contributions.

The statute exempts so much of the joint property as is shown to have been contributed by the survivor "and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration * * *." Mrs. Folger contributed shares of a death value of over $800,000. which she received or acquired from the decedent as gifts at various times from a year to four years prior to contributing them to the joint tenancy. Nevertheless we contend that since she received the shares before the incidence of any federal estate tax act, the statute properly construed entitles her to the exemption. This contention involves a non-retroactive construction of the statute as if it read "and never *after the passage of this act* to have been received or acquired * * * from the decedent * * *." The words "at any time" have been twice construed by this Court to mean "at any time *after the passage of this act.*" (*Shwab* v. *Doyle,* 258 U. S. 529, (*supra*); *Hassett* v. *Welch,* 303 U. S. 303, 308 (1938)).

The way is thus open for construing this limitation of the the exemption as prospective if that is the intent of Congress.

The intent of Congress in limiting the exemption was to eliminate the tax evasion possible if a husband could, by giving his fortune to his wife and having her create a joint tenancy, split the income in halves but make sure that if he died first there would be no tax. As the reason for the limitation of the exemption is to prevent evasion of tax, it should not be construed so as to apply at a time when there was no tax to evade.

The Government argues that subdivision (h) of Section 302 of the federal estate tax act of 1926 (Revenue Act of

1926, 44 Stat. 71), which clearly expresses the intent of Congress to levy a retroactive tax, expresses also the intent of Congress to make the limitation of the exemption retroactive. Subdivision (h) enumerates the transactions and interests with respect to which the act is made retroactive, and the "receipt or acquisition" of the property by the contributor to a joint tenancy is not listed in that enumeration. As might be expected, subdivision (h) confines itself to making the tax retroactive without concerning itself with any retroactive effect of the limitation of the exemption.

ARGUMENT.

POINT I.

Emily C. J. Folger, the survivor, had a vested interest in the joint account prior to the passage of any federal estate tax act. This interest was in substance ownership of one-half of the stock. The Revenue Act of 1926 in so far as it purports to include the value of the survivor's interest in the joint property in the decedent's estate for tax purposes violates the Fifth Amendment of the Federal Constitution.

The statue involved is Section 302 (e) of the Revenue Act of 1926, quoted on page 36 of the Appendix. A reading of the Act shows that there is no doubt of the intention of Congress to tax the whole of joint estates and estates by the entirety even when created prior to the passage of the original federal estate tax act. There are certain exceptions based upon the source of the property which will become of importance in our second point but are immaterial here.

This Court has decided that Congress may constitutionally tax the following:

> The whole of a tenancy by the entirety created after the incidence of the federal estate tax act. (*Tyler* v. *U. S.*, 281 U. S. 497, *supra*).

> The whole of a tenancy by the entirety created prior to the incidence of the federal estate tax act. (*Third National Bank and Trust Co.* v. *White*, 287 U. S. 577, *supra*); *Helvering* v. *Bowers*, 303 U. S. 618 (1938)).
>
> The whole of a joint tenancy created after the incidence of the federal estate tax act. (*Foster* v. *Commissioner*, 303 U. S. 618, *supra*).
>
> Half of a joint tenancy created prior to the incidence of the federal estate tax act. (*Gwinn* v. *Commissioner*, 287 U. S. 224, *supra*).

The question whether Congress can constitutionally tax the other half of a joint tenancy created prior to the incidence of the federal estate tax act has never been before this Court. Congress was upheld in its attempt to exercise this power by the Circuit Court of Appeals for the Second Circuit in the case at bar. Congress was held to be without such power in *United States* v. *Jacobs*, 97 F. 2d 784, *supra*, No. 391, October, Term 1938, set for argument immediately preceding the case at bar.

While this Court has thus never held that it would be unconstitutional to exact an estate tax laid upon the whole of a joint tenancy created prior to the incidence of the taxing act, this Court has held in substance that to tax more than the decedent's half interest in such a case would be retroactive taxation of the closed transaction creating the survivor's half interest, and as such would not be deemed to be the intent of Congress in the absence of the clearest and most explicit statutory language. (*Knox* v. *McElligott*, 258 U. S. 546, *supra*; *Cahn* v. *U. S.*, 297 U. S. 691, *supra*).

Congress has, however, by amendment of the act (Section 302 (h) of the 1926 Revenue Act (44 Stat. 71), effective 1924, printed at page 37, *infra*), made its intention clear to tax such a transfer. The case at bar, and its companion, the *Jacobs* case, are the first cases to test the constitutionality of that intention in this Court.

In spite of the intention of Congress thus manifested, the Commissioner of Internal Revenue evidently doubted the

constitutionality of the position taken in 1924, and there was in force at the time of the death of the decedent herein on June 11, 1930, a regulation providing that not even one-half of a joint tenancy created prior to any federal estate tax act should be included in the gross estate (T. D. 4248, amending Article 22 of Regulations 68 and 70, Appendix, p. 37).*

Twenty-two days after the decedent died, however, this regulation was withdrawn (T. D. 4295, amending Article 22 of Regulations 70, 1929 Edition) and the Commissioner is attempting to include the value of the whole of the joint estate in the gross estate of the decedent.

The Commissioner is just as wrong in ruling that the whole of a joint estate created before the taxing act can be taxed as he was in ruling that none of it could be taxed. The survivor at the instant of the creation of the joint tenancy obtained a vested right in one-half of the property which could not be disturbed by subsequent legislation without offending the Fifth Amendment of the Constitution of the United States.

The fundamental distinction for estate tax purposes between the decedent's half of jointly held property and the survivor's half is well known in this Court. One of the four companion cases in which this Court in 1922 rejected the contention that the terms of the first federal estate tax act required that it be applied retroactively was *Knox* v. *McElligott*, 258 U. S. 546, *supra*, where the facts were exactly like those of the case at bar. A joint tenancy was created prior to the passage of any federal estate tax act. One of the joint tenants died after the passage of the first federal estate tax act. The act purported to tax the whole of all joint tenancies. The whole of the property was assessed by the Commissioner and the taxpayer brought an action to recover the tax on the survivor's half. He was successful in the District Court. The Circuit Court of Appeals reversed the District Court but this Court in turn reversed the Circuit Court of

* For a case where the Commissioner acted under this ruling, see *Tait* v. *Safe Deposit & Trust Co.*, 70 F. 2d 79 (4th Circuit, 1934).

Appeals, saying that to tax the survivor's half would be to give the statute a retroactive operation. However, instead of holding the statute unconstitutional, this Court merely held that Congress would not be deemed to have passed a retroactive statute unless the statute contained an express statement to that effect. Other cases which will be immediately referred to demonstrate the view of this Court that the creation of a join tenancy before the incidence of any federal estate tax act is a completed transaction as far as the survivor's half is concerned.

This Court's views on that subject are well summed up in the short opinion of the Court by Mr. Justice Sutherland, in *Griswold* v. *Helvering*, 290 U. S. 56 (1933). There a joint tenancy was created before the incidence of any federal estate tax act and the decedent died before the act was made expressly retroactive. The Commissioner of Internal Revenue included the whole value of the joint property in the gross estate but the Board of Tax Appeals and the Circuit Court of Appeals reduced the share to one-half. In this Court the Government conceded in accordance with *Knox* v. *McElligott* that only a retroactive statute could reach the survivor's half and that the then federal estate tax act was not retroactive. The taxpayer, however, sought to escape taxation even with respect to the decedent's half. In disposing of that claim, Mr. Justice Sutherland gave the opinion which follows (except for the statement of facts) in full (p. 58):

> "Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and

control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See *Gwinn* v. *Commissioner*, 287 U. S. 224, and cases cited. And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

"Petitioners insist that *Knox* v. *McElligott*, 258 U. S. 546, is to the contrary, but, clearly, it is not. There the tax return included the value of decedent's one-half of the jointly owned property, but did not include the value of the half which had been owned and enjoyed by the surviving joint tenant. Nevertheless, the commissioner undertook to impose a tax in respect of the value of this latter half as well. This court held that to do so was to apply the statute retroactively, and that this, under the circumstances of that case, could not be done. It did not hold, or intend to hold, that the statute was retroactive in so far as the value of the decedent's half of the joint estate was concerned. That question was not there involved. It is the only question here."

Knox v. *McElligott*, 258 U. S. 546, *supra*, was thus, as Justice Sutherland interpreted it, a case where the court held that to include the value of the half of jointly owned property which had been owned and enjoyed by the surviving joint tenant prior to the passage of the act would be to apply it *retroactively.*

The *Knox* case was decided by this Court on the authority of *Shwab* v. *Doyle*, 258 U. S. 529, (*supra*). In the *Shwab* case the decedent had made a transfer in trust in 1915, and then died in 1916, seven days after the passage of the first federal estate tax act. That act provided that a tax was to be imposed upon the transfer of the net estate of every decedent dying after the passage of the act—

"To the extent of any interest therein of which the decedent has *at any time* made a transfer, or with

> respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * * ." (Revenue Act of 1916, Sec. 202(b) 39 Stat. 756, 777, italics ours.)

The Commissioner of Internal Revenue assessed a tax upon the transfer. The tax was paid and an action was brought to recover it. In the District Court the jury found that the transfer was one made in contemplation of death, and the District Court's judgment for the Government was affirmed by the Circuit Court of Appeals. This Court, however, reversed upon the ground that in spite of the language of the Act,* it would not be deemed to be retroactive. Mr. Justice McKenna, speaking for the Court, closed his opinion with these words (p. 536):

> "We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of congress, and have resolved that it should be not construed to apply to *transactions completed* when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916." (Italics ours.)

Since it was on the authority of the case of *Shwab* v. *Doyle* that this Court held in *Knox* v. *McElligott* that only one-half of jointly held property could be subjected to a

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* For a similar non-retroactive construction of the words "at any time" in a federal estate tax act see *Hassett* v. *Welch*, 303 U. S. 303, 308, *supra*.

subsequently enacted federal estate tax act without a retroactive application of the statute, it is fair to say that this Court has treated the creation of the survivor's share of property in a joint tenancy established prior to the passage of any federal estate tax act as a "completed transaction."

Beside *Knox* v. *McElligott,* the other three of the companion cases where this Court refused to construe the old federal estate tax act as retroactive were *Shwab* v. *Doyle,* 258 U. S. 529, *supra,* involving a preexisting transfer in contemplation of death, *Union Trust Co.* v. *Wardell,* 258 U. S. 537, *supra,* involving a preexisting trust estate, and *Levy* v. *Wardell,* 258 U. S. 542 (1922), involving a preexisting conveyance with the reservation of a life estate.

Congress has since these companion decisions changed its language so that the retroactive purpose is unmistakable.

This case and its companion the *Jacobs** case now before this Court are the first to test this attempt of Congress at retroactive taxation in so far as it applies to the preexisting interest of a surviving joint tenant, but in so far as it applies to preexisting trust estates, it has been tested and has failed. The cases where this occurred are *Nichols* v. *Coolidge,* 274 U. S. 531, *supra, Helvering* v. *Helmholz,* 296 U. S. 93, *supra,* and *White* v. *Poor,* 296 U. S. 98, *supra.* It was these cases upon which the Circuit Court of Appeals for the Seventh Circuit in the *Jacobs* case based its conclusion of the unconstitutionality of the levy of an estate tax upon the survivor's interest in a joint tenancy created prior to the incidence of any federal estate tax act. These cases were not distinguished, and, in fact, not cited by the Circuit Court of Appeals for the Second Circuit in reaching the contrary decision in the case at bar.

In *Nichols* v. *Coolidge* the Court's reasons for holding the retroactive taxing act unconstitutional were (1) that it is beyond the power of Congress to impose an excise upon

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* *Jacobs* v. *United States,* 97 F. 2d 784, *supra,* assigned for argument as No. 391 of October Term, 1938, immediately preceding the argument of the case at bar.

transfers made before the enactment of the excise law; (2) that to attempt to lay an excise upon the transfer of the decedent's property at death reckoned upon the value of the property which was transferred before the passage of the statute, is arbitrary and capricious and so violates the Fifth Amendment.

The facts in *Nichols* v. *Coolidge* were as follows: In 1907, Mrs. Coolidge and her husband transferred certain real estate and personal property (without consideration) to trustees who were to hold it and pay the income to the settlors and after their death to pay over the corpus to the settlors' children or their representatives. In April, 1917, the settlors assigned their interest in the trust property, including the right to receive the income from the trust, to the remaindermen, but the trustees continued to hold the property. Mrs. Coolidge died in January, 1921. The Commissioner of Internal Revenue held that, under Section 402(c) of the Revenue Act approved February 24, 1919, (40 Stat. 1057, 1097) the value of all the property transferred to the trustees should be included in her estate. The taxpayer paid the resulting additional taxes and sued to recover them. Section 402(c) purported to tax transfers or trusts intended to take effect in possession or enjoyment on or after the decedent's death *whether such transfer or trust was made or created before or after the passage of the act.*

Nichols v. *Coolidge,* therefore, presented the question of the power of Congress to tax transfers made prior to the passage of the act imposing the tax. This question had not been expressly decided by this Court in the earlier cases in which the Revenue Acts had been construed as not intended to impose a tax upon transfers so made. (*Lewellyn* v. *Frick,* 268 U. S. 238, 251 (1925); *Shwab* v. *Doyle,* 258 U. S. 529, *supra; Knox* v. *McElligott,* 258 U. S. 546, *supra.*) In the *Nichols* case, the court held that the attempt by Congress to make the statute retroactive offended the Fifth Amendment. The Court said (274 U. S. 531 at p. 542):

> "And we must conclude that §402(c) of the statute here under consideration, in so far as it requires that

> there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Helvering v. *Helmholz*, 296 U. S. 93, *supra*, involved the taxability of a trust created in 1918. The trust contained certain provisions in substance that all parties in interest including the settlor might, by concurrent action, terminate the trust. The Revenue Act in effect when the trust was created would not have required the trust property to be included in the settlor's gross estate. The Commissioner of Internal Revenue took the position that the provisions of the trust with respect to termination required that the corpus be included in the settlor's gross estate under an act thereafter adopted, Section 302(d) of the 1926 Act, (44 Stat. 71) as a trust which was subject to the exercise of a power by the decedent in conjunction with other persons to alter, amend or revoke. This Court held that the subsequently adopted act could not constitutionally tax the transfer, Mr. Justice Roberts saying, for a court unanimous upon that point, at page 97:

> "Another and more serious objection to the application of §302(d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If §302(d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531."

White v. *Poor*, 296 U. S. 98, *supra*, passed upon substantially the same question as *Helvering* v. *Helmholz*, all the

justices again agreeing that Congress could not make Section 302(d) retroactive because of the Fifth Amendment.

The three cases just discussed were not decided upon peculiarities of the particular sections of the Revenue Act involved. They were decided upon the broad general principle that Congress may not make an act retroactive so as to include in the decedent's gross estate property transferred prior to the imposition of the tax. There is, therefore, no basis for distinguishing the case now before the court, which involves Section 302(e) of the 1926 Act (44 Stat. 71), from *Helvering* v. *Helmholz* and *White* v. *Poor* which involved Section 302(d) of the same Act, or from *Nichols* v. *Coolidge,* which involved Section 402(c) of the Revenue Act approved February 24, 1919, (40 Stat. 1057, 1097).

In *Nichols* v. *Coolidge, Helvering* v. *Helmholz* and *White* v. *Poor,* in each case, the death of the settlor was the occasion for the ripening of rights of the survivors in the whole property. But that fact did not prevent this Court from holding that in cases where the survivors had had vested interests in the property before the incidence of the federal estate tax act those vested interest could not be taxed upon the ripening of the additional rights therein. It is true that the rights protected in those three cases were the rights of beneficiaries of trusts and that the right here claimed to be protected is the right of the survivor of two joint tenants. But the right of that joint tenant is the fruit of what this Court has characterized as a completed transaction which cannot be reached except by a retroactive statute (See pp. 13-16 *supra*). There is no more reason for voiding a retroactive statute where it attacks the interests of trust beneficiaries as in the *Nichols, Helmholz* and *White* cases, than where it attacks the interest of the survivor of two joint tenants as in the case at bar. Indeed, Mrs. Folger's rights as a joint tenant did not differ from those which could have been given her under a trust to divide a fund into two shares and pay the spouses the income from the respective shares for their joint lives and then to convey

the property to the survivor with the right of the income beneficiaries to alienate their shares during the joint lives. As an example, a trust of that character has been drawn in the stereotyped language of such instruments and is given in Appendix B at page 39.

The only practical distinction urged by the court below between the case at bar and the cases of protected vested interests was that until the decedent's death the survivor faced the hazard of losing her interest to the decedent if she should prove to be the first to die.

In most respects Mrs. Folger's interest in the joint property was more clearly a vested property right than were the interests of the trust beneficiaries which were protected in the *Nichols, Helmholz* and *White* cases. There was no interposition of a trustee in Mrs. Folger's case and she could deal with her interest in the trust property as she saw fit.

That was the meaning of the old law French rule that tenants by the entirety are seized *per tout et non per my* and joint tenants are seized *per tout et per my* and tenants in common are seized *per my et non per tout.* (*Matter of Klatzl*, 216 N. Y. 83, 87 (1915); 4 Kent Comm. 8th Ed., *359, *368).

It is true that while the trust beneficiaries in the *Nichols, Helmholz* and *White* cases could not deal with their shares as freely as could Mrs. Folger, there was no risk that their interests in the trust property would be lost by the death of all of the beneficiaries prior to the death of the settlor, corresponding to the risk in Mrs. Folger's case that her property interest might be lost if she had died before Mr. Folger.

It is on that distinction that the decision below must be supported if at all. The extinction of that risk (that Mrs. Folger's interest might go to Mr. Folger if she predeceased him without having conveyed it) was the only change made to Mrs. Folger's half interest in the joint property as a result of her husband's death.

Taxation is a practical, not metaphysical, matter. The statute in terms taxes the interest "held by the decedent and any other person as joint tenants", i. e., the sum of all of the rights which go to make up the joint estate. That is palpably unconstitutional as to such of those rights (if any) as were vested prior to the passage of the act. One such right was Mrs. Folger's right to step into a broker's office and sell her interest in the stocks held in the joint names for exactly one-half of the total value. It was vested as securely as the right of the trust beneficiaries in the *Nichols, Helmholz* and *White* cases. It was worth exactly what she could get for it, i. e., one-half the market value of stocks held in joint tenancy. The extinguishment on Mr. Folger's death of the risk of loss added not one penny to its value.

This Court in *Knox* v. *McElligott*, 258 U. S. 546, *supra*, and *Cahn* v. *U. S.*, 297 U. S. 691, *supra*, when it held that the interest of the survivor could be reached only by a "retroactive statute" taxing the fruit of a "completed transaction" (see *supra*, pp. 13-16) fixed one-half of the whole as the interest which it exempted from the operation of the non-retroactive statute then before the court. No deduction was made for the risk which had been run by the survivor at all times during the joint lives that he might lose his interest by being the first to die.

Thus an interest in the joint property, worth one-half of the value of such property, was vested in Mrs. Folger before the passage of any federal estate tax act. Therefore any additional interest which she obtained in that property after the passage of the act, by reason of the death of Mr. Folger or otherwise, could not have represented more than the other half of its value.

While no tax can constitutionally be levied upon the vested interest of Mrs. Folger in the joint estate created before the passage of any federal estate tax act, and while there is nothing in the federal estate tax act which permits the levy of a tax upon less than the sum of all of the interests in a joint estate, the plaintiff has, by returning one-half for taxation, conceded that where any part of the estate may

constitutionally be subjected to taxation the statute will serve to do so. The statute will not, however, serve to subject to taxation more than the interest in the property which Mrs. Folger received by reason of the death of Mr. Folger. That interest could not have had a value in excess of one-half of the value of the whole joint estate. We concede the right to levy a tax on that half.

The court below attempted to justify the taxation of the whole by saying (R. 159):

> "In the instant case, before the death of the decedent, the surviving tenant had the right to possess and use the whole property. So too did her husband."

The court would have us believe that, in spite of Mrs. Folger's right to one-half of the dividends on the stock and her right to sever a half interest in the principal,* Congress, on her receiving the rest of the rights of the property at her husband's death, can levy the same tax as though she had never before had any rights in the property and this because of the old legal scholars' definition of the joint tenant's interest as an ownership of the whole as well as an ownership of the half. We are told in effect that since the schoolmen chose to express the rule of survivorship by saying that each tenant owned the whole, *ergo,* when Mr. Folger died the whole estate passed to Mrs. Folger.

The danger of using this metaphysical argument in the practical world of estate taxation was well illustrated in *Tyler* v. *United States,* 281 U. S. 497, *supra.* There it was the taxpayer who relied upon the magic of the old law French definition. The case involved a tenancy by the entirety where each tenant is said to be seized *per tout,* or, in other words, to own the whole. Although the estate was created after the incidence of the federal estate tax act, the taxpayer argued that it could not be subjected to tax on the death of one of the tenants because the survivor had owned the whole all along and received nothing. This Court upheld the tax,

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* *Hiles* v. *Fisher,* 144 N. Y. 306, 312, 315 (1895).

Mr. Justice Sutherland rejecting the argument as follows (p. 503):

> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
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> * * * * * *
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> "Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428), the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In spite of the rejection by the *Tyler* case of the argument that seizin *per tout* meant that the surviving tenant received nothing on the death of the decedent, it was again advanced, this time with respect to joint tenancies, and was

again rejected by this Court. The case where the argument was asserted was *Gwinn* v. *Commissioner,* 287 U. S. 224 *supra.* The case involved a joint tenancy created before any federal estate tax act and death occurred after the retroactive amendment. But as the joint tenants contributed equal shares, only one-half was subject to tax under the terms of the statute. Hence the question of the right to tax the other half was not involved. The taxpayer, however, objected to the taxation of even the decedent's half, maintaining (p. 226):

> "That under the tenancy created in June 1915, each party acquired immediate joint ownership in the whole property; that is, interest therein then became completely vested and no change in title or transfer of interest occurred by reason of the cotenant's death."

This Court answered by quoting parts of the opinion in the *Tyler* case quoted above, and pointing out (p. 229) that "death became the generating source of definite accessions to the survivor's property rights." The metaphysical argument that the survivor did not even receive the rights theretofore held by the decedent was properly rejected.

Applying the words of the Court to the case at bar, the death of Mr. Folger became the generating source of definite accessions to property rights of Mrs. Folger. While death was the source of accessions to these property rights, death was not the source of the rights themselves. The original rights existed prior to the incidence of any federal estate tax act. Only the accessions came afterward and only the accessions can be taxed. The accessions were but one-half.

After this Court had held in the *Tyler* case, and reiterated in the *Gwinn* case, that the power to tax tenancies by the entirety and joint tenancies would be judged by realities rather than fictions, there came before it in *Third National Bank & Trust Co.* v. *White,* 287 U. S. 577 *supra,* the case of a tenancy by the entirety created prior to the incidence

of the federal estate tax act. The principle of adhering to the realities, enunciated in the *Tyler* and *Gwinn* cases, coupled with what had been said in the *Tyler* case about the nature of a tenancy by the entirety, was determinative of the question. The common law fiction that each spouse owned the whole was ignored and the case was determined upon the reality as stated in the *Tyler* case that upon the death of one of the tenants by the entirety leaving a survivor "then, and then only, she acquired the power not theretofore possessed, of disposing of the property by an exercise of her sole will", and that under those circumstances "death brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result * * * to be measured in whole or in part, by the value of such rights." The opinion of this Court was *per curiam* as follows:

> "Judgment affirmed. *Tyler* v. *United States*, 281 U. S. 497, 504, 505; *Gwinn* v. *Commissioner* ante p. 224."

It is at page 504, thus referred to by this Court, that the words above quoted from the *Tyler* opinion occur, and on page 505 is to be found the holding that to tax the value of property, which, as a consequence of the death of one tenant by the entirety, was relieved from restrictions so as to produce in the survivor right of sole proprietorship, was obviously neither arbitrary nor capricious.

In *Helvering* v. *Bowers*, 303 U. S. 618 (1938), a case precisely like the *Third National Bank* case, the Circuit Court of Appeals had failed to follow it and this Court reversed the decision below, this time giving the *per curiam* opinion,

> "The judgment is reversed upon the authority of *Tyler* v. *United States*, 281 U. S. 497."

It was the *Tyler* case that had held that taxation was a practical and not a theoretical matter, and that, looking at

the matter practically, a tenant by the entirety, while both spouses were alive, had nothing instead of having everything. Thus the creation of a tenancy by the entirety, even though it be prior to the incidence of any federal estate tax act, creates no property right in either spouse to be protected by the Fifth Amendment.

The distinction is clear between taxing the interest of the survivor in a tenancy by the entirety where the taxing act was passed after the creation of the tenancy and taxing the interest of the survivor in a joint tenancy under those circumstances. For instance, in *Knox* v. *McElligott*, 258 U. S. 546, *supra*, this Court has held with respect to the interest of the surviving tenant in a preexisting joint tenancy that only an expressly retroactive federal estate tax act could reach it, but this Court has never so decided with respect to the interest of the surviving tenant in a preexisting tenancy by the entirety. The tenant by the entirety receives everything upon the death of the spouse and owned and could dispose of nothing prior to that death, so that everything may be taxed. A joint tenant receives only one-half upon the death of his co-tenant and owned and could dispose of one-half prior to that death, so that only one-half may be taxed. Tenants by the entirety are seized *per tout et non per my* and joint tenants are seized *per tout et per my*, which is to say, that in the case of tenants by the entirety there is survivorship and neither can sever during the lifetime of the other one, and in the case of joint tenants there is not only survivorship, but in addition, each can sever his share during the joint lives. The *Third National Bank* and *Bowers* cases which deal with tenancies by the entirety thus lend no support to the decision below.

In spite of the fact that a theoretical application of the old definition of a tenancy by the entirety and joint tenancy would have resulted in decisions for the taxpayer in the *Tyler* and *Gwinn* cases, the Government here seeks to apply it against the taxpayer. The Government attempts to sustain a tax upon the whole, when only half was transferred

after the incidence of the taxing act, by invoking the same old fiction that the interest of each joint tenant pervades the whole until the death of one. The only sense in which it may be said that the interest of each joint tenant pervades the whole of the property held in joint tenancy is the same sense in which it may be said that the interest of each tenant in common pervades the whole of the property held in common. It would be quite as logical to tax the whole of a tenancy in common, when one tenant leaves his share to his widow, because the interest of each tenant in common pervades the whole, as it is to tax the whole of a joint tenancy on that theory when one joint tenant dies and his share thus passes to the survivor.

But the Government in its brief in this Court in *United States* v. *Jacobs*, No. 391, October Term 1938, urges that this metaphysical conception that the survivor receives the whole upon the death of the decedent has been recognized by this Court in *Foster* v. *Commissioner*, 303 U. S. 618 *supra*. This is expressed in the brief as follows (p. 12): "In the case of a joint tenancy it also is true that the interest of the decedent pervades the whole property and ceases only at his death, which perfects the interest of the survivor in the whole estate. This is the premise which necessarily underlay the decision in *Foster* v. *Commissioner*, *supra*, permitting the taxation of the entire joint tenancy."

The Government is in error in thus saying that the *Foster* case can be supported only on the metaphysical conception of the joint tenancy. It must be borne in mind that it was a case which permitted the taxation of the whole of a joint tenancy which was created after the incidence of the federal estate tax act. Such a tax is supported upon the power of Congress to impose an excise upon a transfer made after the incidence of the taxing act. The Gift Tax is a familiar example of such an excise. The existing federal estate tax act, in its operation upon the survivor's interest in jointly held property where the transfer to the joint names was made after the incidence of the act, is really a tax upon the original transfer and differs from the Gift Tax only

in that payment of tax is postponed until the death of one of the joint tenants.

It is sometimes said that, granting that Congress cannot constitutionally tax the whole of joint tenancies created before the taxing act, it could so manipulate the rate of taxation that the net result would be precisely the same as though it actually had the power to tax the whole of the jointly held property, and that our quarrel is therefore merely with the verbiage rather than with the substance of the statute. The tax being a graduated one, such a statute would have to provide that in the case of joint tenancies there should be included in the taxable estate only such fractional part of the property held in joint tenancy as passed to the survivor or survivors upon the death of the decedent, and that the rate of taxation upon the property so passing should be increased sufficiently above the normal rates so that the total tax should be exactly the same as if the whole property had been held by the decedent in fee simple.

We are unable to distinguish this contention from the one made in *Nichols* v. *Coolidge*, 274 U. S. 531, *supra*, where the Government urged that the estate which had vested before the incidence of the taxing act was not being taxed but was merely being made the measure of the tax on the decedent's estate. The answer here is the answer there given by Mr. Justice McReynolds (p. 541):

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

POINT II.

The court below erred in construing the statute as requiring the inclusion in the gross estate of shares of stock given by Henry C. Folger to Emily C. J. Folger and by her contributed to the joint tenancy, all before the effective date of any Federal Estate Tax Act.

We here print for convenience the provisions of Section 302 of the Revenue Act of 1926 (44 Stat. 71) in force at the date of the death of Henry C. Folger which will be discussed in this point. The entire section is printed in Appendix A at pages 35-37, *infra*.

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> "(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *." (Two provisos, immaterial here, are appended to Section 302(e)).
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> * * * * * *
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> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The individual property of Mrs. Folger acquired by her absolutely from Mr. Folger from two to four years before the passage of any federal estate tax act, and which she transferred to the joint names of herself and her husband prior to any federal estate tax act, should not properly be included in Mr. Folger's gross and net estates. The case at bar is apparently the first wh e facts raise this point. It involves property valued at $846,772.15, the tax upon which petitioner computes at $26,298.45 (R. 103).

It is our position that even if Congress could constitutionally have subjected the entire joint estate to federal estate tax, the statute, properly construed, exempts the contributions made by the survivor, Mrs. Folger.

The exemption on which we rely is that part of Section 302 (e) of the Revenue Act of 1926 (44 Stat. 71) which reads:

> "* * * except such part thereof as may be shown to have originally belonged to (the survivor) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth."

Congress thus expressly exempted from taxation so much of the property held in joint tenancy as may be shown to have originally belonged to the survivor and never to have been received from the decedent for less than a fair consideration. There is thus an exemption in favor of contributions by the survivor and a limitation of the exemption to contributions of property which were never received from the decedent. The question is whether that limitation is prospective only or whether it is retroactive back beyond the date when it was written into the law. If it is prospective only, it should be read as exempting all contributions by the survivor which were "never" *after the passage of this act* "received from the decedent", and Mrs. Folger's contributions are exempt because they were received from the decedent prior to the passage of the act. If, on the other hand, the limitation on the exemption is re-

troactive, then Mrs. Folger's contributions are taxable because they were *at some time* received from the decedent.

This court has been loath to construe the federal estate tax act as retroactive. In *Shwab* v. *Doyle,* 258 U. S. 529 (*supra*), the statute taxed gifts in contemplation of death made *at any time,* but this court (p. 536) construed that expression to mean *at any time* "after the passage of this act." (See also *Hassett* v. *Welch,* 303 U. S. 303, 308 *supra.*)

The word "never" is but the negative of the words "at any time", which were construed in the *Shwab* case as prospective only. (Webster's New International Dictionary, Second Edition, 1937.) There is thus no obstacle to construing the word "never" in the statute under consideration as meaning "not at any time after the passage of this act" if the rest of the statute indicates that that was the intent of Congress.

Examining that intent we find that the reason for exempting contributions by the survivor is clear. Congress wished to tax only those transfers where the ultimate effect was a transfer from one joint tenant to the other. If a wife contributed 100% of the joint property and the husband died, Congress wanted to exempt the transfer of what had been the wife's own property back to herself. That was the reason for exempting contributions of the survivor. If, however, Congress stopped there, it would have invited tax evasion. The husband might have wished to give his property to his wife upon his death and to avoid any tax upon it. He could give it to her on one day and on the next have her give it to the joint estate. Then, on his death, there would have been in substance a transfer from him to his wife, but it would have been exempt because the property would have technically been contributed to the joint tenancy by the wife. It is admitted on all hands (*e. g.,* opinion below, R. 160), that it was in order to avoid this evasion that the limitation on the exemption was inserted in the statute. That purpose is fully carried out by a prospective interpretation. There was no reason for making the

limitation retroactive and excluding from the benefit of the exemption property which the decedent had given to the contributor before there was any federal estate tax act to be evaded. In supporting the interpretation of the Commissioner of Internal Revenue, the government seeks to have this court construe a provision admittedly designed to prevent tax evasion in such a way as to penalize transactions which took place when there was no tax to evade. Since there is no reason for construing the limitation as retroactive and there is room for construing it as either retroactive or prospective, it should be construed as prospective only and the contributions made by Mrs. Folger from gifts made by Mr. Folger to her before any federal estate tax act should be exempted from tax.

The purposes of the act will be fully served and evasion will still be impossible if the limitation upon the exemption be construed as prospective only. The Government in its brief in opposition to the petition for *certiorari* in the case at bar intimates (p. 7) that subdivision (h) of Section 302 of the Revenue Act of 1926, which was added in 1924, with the express purpose of making the federal estate tax act retroactive with respect to the "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described" in Section 302, makes the act retroactive as well with respect to the "receiving" or "acquiring" from the decedent of the property afterwards contributed to the joint estate. That is precisely what subdivision (h) does not do. It carefully enumerates the transactions and interests as to which the federal estate tax act is made retroactive. Each of the "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers" referred to in the retroactive section can be identified as one of the subjects of the taxes imposed by Section 302. Section 302 (e) in describing the transaction by which the contributor receives from the decedent the property afterwards contributed to the joint tenancy uses none of these words. The words used in subdivision (e) are "received or acquired".

Not only does the language of subdivision (h) thus fail to make the act retroactive with respect to the receipt of the property by the contributor, but the omission is just what one would expect. The natural intention of the legislature in desiring to make the taxing act retroactive would be to make it retroactive with respect to the subject matter of the tax and not to the limitations of exemptions from tax. As conceded by the Government in its brief in opposition to the petition for *certiorari*, at page 6, "The tax is not laid upon the prior gift to the survivor, but upon the event which occurs at death and which accomplishes or completes a transfer to the survivor of what was first the decedent's property." Neither the provisions of the act which lay the tax nor its provisions which make the act retroactive extend to the prior receipt or acquisition by the survivor.

Injustice results from the construction made by the court below. Before the passage of the first federal estate tax act, there was no signal hung out to warn a person that in creating a joint estate she ought to choose property which she had never received or acquired from the other joint tenant. There would be no reason in the mind of such a person for distinguishing between the two classes of property. She surely could not be expected to anticipate the passage of a statute so capricious as to impose a tax in the case of one class and not in the case of the other.

We submit that this Court should construe the statute in accordance with the principles pronounced in *Lewellyn v. Frick*, 268 U. S. 238 (*supra*), where Mr. Justice Holmes, after stating that acts of Congress are to be construed so as to avoid doubt as to their constitutionality, said at page 251 (italics ours):

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose *before* their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

CONCLUSION.

The cause should be remanded with instructions to modify the judgment by adding thereto the sum of $26,298.45, with interest thereon from the 17th day of May, 1933, representing the federal estate tax based upon the value of the property contributed by Emily C. J. Folger to the joint tenancy, and by further adding thereto the sum of $26,578.88, with interest thereon from the 17th day of May, 1933, representing the excess of the federal estate tax based upon one-half the value of the property held in said joint tenancy over and above said federal estate tax based upon the value of said contributed property. (See R. 103, fol. 309.)

Respectfully submitted,

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APPENDIX A.

*Revenue Act of 1926, Section 302:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or other-

* Involved in case at bar.

wise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided, further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

"(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

"(i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

*Regulations 70, Art. 22:**

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY.—The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any

* In force on June 11, 1930, the date of the death of the testator, and until July 3, 1930.

person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common."

Regulations 80, Art. 22:†

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY.—The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 302(e), as amended, applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

† Presently in force.

APPENDIX B.

An assignment of property to trustees in trust:

To divide the same into two equal shares and

As to the first of such equal shares, to collect the income thereof and to pay the net income thereof unto Henry C. Folger during the joint lives of Henry C. Folger and Emily C. J. Folger, and at the termination of such joint lives, to assign, transfer and deliver the principal thereof unto the survivor of said Henry C. Folger and Emily C. J. Folger.

As to the second of such equal shares, to collect the income thereof and to pay the net income thereof unto Emily C. J. Folger during the joint lives of Henry C. Folger and Emily C. J. Folger, and at the termination of such joint lives, to assign, transfer and deliver the principal thereof unto the survivor of said Henry C. Folger and Emily C. J. Folger.

As to each of such trusts, the person entitled to the income therefrom is hereby empowered to sell the property subject thereto at any time during said joint lives and to receive the proceeds thereof free of any trust, and in the event of such sale, the trustees shall assign, transfer and deliver the principal of the other trust unto the person theretofore entitled to the income thereof.

Until the termination of said joint lives or until the prior termination of the trusts created hereby, the said trustees shall keep the property constituting said two trusts in a single consolidated fund in which the separate trusts shall have undivided interests.